Supreme Court, U.S.
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No. 98-1810

IN THE

Supreme Court of the United States

SHERRY L. McGINNIS,

Petitioner,

v.

ANCHORAGE SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ANCHORAGE SCHOOL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Respondent Anchorage School District (hereinafter "District") disagrees with Petitioner that any questions of national importance are presented for review in this petition since the decision issued by the Court of Appeals for the Ninth Circuit in this case was a Memorandum Decision. Under Ninth Circuit Rule 36-3, disposition of an appeal through a Memorandum decision means the case is not appropriate for publication and may not be cited to or by the courts of the Ninth Circuit except as provided under that Rule. Therefore, the Memorandum decision issued by the Court of Appeals in this appeal is of no precedence within the Ninth Circuit and has even less consequence nationally.[1]

To the extent Petitioner has raised any questions worthy of response, the questions must be presented as follows: Is due process under the Fourteenth Amendment violated when (a) a tenured teacher ignores the direction of her principal to obtain her contract at the District personnel office (and leaves the school, thereby abandoning her position); (b) ignores the advice of her counsel that she has been reinstated to a teaching position; (c) ignores the advice and admonitions of her counsel and bargaining representative that she must return to school or risk termination; and (d) ignores the advice and admonitions of her counsel and bargaining representative that she must request a hearing within fifteen days after receiving her notice of termination in order to protect her tenured employment? May this

1. See Appendix A, p. 2 to Petition for Writ of Certiorari. See also Appendix B, p. 6a where the panel voted to deny the petition for rehearing and to reject suggestion for rehearing en banc, since no judge of the full court requested a vote on the petition.

teacher then wait one year and 364 days before coming forward to complain about her reinstatement and termination through the filing of a lawsuit in federal court alleging, in fifteen separate causes of action, that she is entitled to recover $60,000,000 claiming she was improperly terminated two years earlier? May this teacher then fail and refuse to comply with discovery and fail to adequately respond to motions for summary judgment by offering sufficient competent evidence that would establish any genuine issue of material fact for trial? May this teacher then raise frivolous issues on appeal and rely simply on the same conjecture and supposition contained in the mere allegations in her unverified complaint, as she did before the District Court? May this teacher finally claim that the Court of Appeals failed to apply the proper criteria or standard when she loses her appeal and then question the integrity and honor of the members of the appeal panel? The only answer to these questions is, unequivocally, NO.

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STATEMENT OF THE CASE[2]

Petitioner Sherry L. McGinnis (hereinafter "McGinnis") was employed initially by the District as a teacher in August 1981. She taught English and language arts at Dimond High School in Anchorage, Alaska. In January 1988, she allegedly slipped on some lettuce on the hallway floor at school and injured her back. Between January 1988 and May 1990, McGinnis was out of school on workers' compensation; in May 1990, her treating doctor released her to return to work without restriction.

However, rather than return to work, McGinnis elected to go to law school in San Diego, California. App. E, p. 16a. She attended law school for two years and graduated in August 1992. However, prior to her enrollment in law school, the District requested that she either return to work as a teacher or request leave without pay, once her workers' compensation benefits ended; when she refused, she was terminated in April 1989. App. E, p. 15a. Thereafter, through her teachers union, she obtained the services and representation of John Patterson, an attorney in Anchorage, Alaska, who filed a lawsuit in her behalf in state court challenging the termination. *Id.*

In June 1992, the state court granted summary judgment in favor of McGinnis and ordered that she "shall be immediately offered reinstatement with no break in service." App. G, p. 61a. The state court made no award of damages

2. The facts provided in this Statement of the Case are taken largely from the Statement of Facts determined by the district court from the record in its various rulings of the summary judgment motions. These rulings are provided as part of the Petition for Writ of Certiorari in Appendix E at pp. 15a-20a, 38a-43a and 46a-47a.

to McGinnis and she made no request for clarification or reconsideration of damages arising from her termination. Within days of this order, the District sent to McGinnis a letter offering her immediate reinstatement as a teacher. App. E, p. 40a. Shortly thereafter, she began communicating directly with the District about her reinstatement and her teaching position when she returned. App. E, p. 17a. A position was allocated for her at West High School in Anchorage as an English teacher. The principal at the school called to advise her of the position and welcome her as a new staff member.

In August 1992, McGinnis traveled to Anchorage to assume her teaching position at West High School. She was advised that a contract would be available for her at the school when she arrived the first day for teachers' in-service training. App. E, p. 17a. The District personnel office prepared a standard teacher's contract for McGinnis, but it was not sent to West High School. App. E, p. 41a. When she arrived at the school on August 25 early in the morning, she introduced herself to the principal and asked where her contract was. He told her he had not seen it and asked his secretary to look for it. When it was not found at the school, the principal directed her to go to the District personnel office to obtain the contract. App. E, p. 17a. However, McGinnis refused to remain at the school without the contract and left within 20 minutes after arriving; she never returned to the school nor did she go to the personnel office to obtain her contract. *Id.*

McGinnis left the school and went to the law offices of Mr. Patterson, the attorney who had obtained the order for her reinstatement in state court. He advised her that she had an enforceable contract with the District as a result of

the state court order, even if no contract was waiting for her at the school when she arrived, as she had expected. App. E, p. 18a. Mr. Patterson advised her that she must go back to the school and not abandon her position. *Id.* A few days later, Mr. Patterson advised McGinnis that it was his understanding there was a written contract for her and she must return to work as soon as possible. *Id.* McGinnis did not follow his advice; she never contacted anyone at the District about her contract, which was in the personnel office. *Id.*

After she had been absent without authorization or excuse for five days, the Executive Director of Personnel for the District wrote McGinnis a letter advising her that her employment with the District had been terminated. *Id.* In this letter dated August 31, 1992, McGinnis was advised that she "may request a hearing before the School Board concerning her termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter." App. E, pp. 18a-19a. Attached to the letter were copies of Alaska Statute 14.20.170(a)(3) and Board Policy 537.61, which explained these rights and procedures. *Id.*

McGinnis did not request a hearing, despite receiving advice from Mr. Patterson and Mark Jones, her bargaining representative, that she must do so to protect her tenured employment as a teacher, if she wished to challenge her notice of termination. App. E, pp. 19a and 20a. Instead, McGinnis spent several weeks traveling around Alaska with her boyfriend and settling her pending divorce action against her former husband who still lived in Anchorage. McGinnis then returned to California where she studied for and took

the California bar exam in February 1993. After passing the bar exam, McGinnis practiced law in California. She was hired and fired by a company in San Diego, which she sued in California State court for wrongful termination. McGinnis was represented in that wrongful termination action by the same boyfriend who traveled to Alaska in August 1992 and toured Alaska with her after she abandoned her position at West High School.

McGinnis did not request a hearing before the School Board within 15 days after her receipt of the notice of termination; instead she filed this lawsuit in federal district court in Anchorage in August 1994, one day shy of exactly two years after she arrived at West High School and walked away, abandoning her teaching position. App. E, p. 38a. After almost three years of litigation and repeated refusal by McGinnis to comply with discovery orders, the district court granted summary judgment in favor of the District and dismissed all remaining claims in the lawsuit against the District. The district court granted summary judgment to the District because "A reasonable fact-finder could not return a verdict in favor of McGinnis based on these undisputed facts . . . [the] scintilla of evidence [offered by McGinnis] will not support a finding that the contract was not in fact being offered to her in the customary channel at the District Personnel Office." App. E, pp. 41a-42a. The district court relied on the evidence that McGinnis repeatedly acted against the advice and direction given by Mr. Patterson, her attorney, and Mr. Jones, her union representative, when she failed to contact the personnel office, after being advised that a contract was prepared for her, and also failed to heed their advice and counsel to request a hearing before the School Board, after receiving the August 31 notice of termination letter from the District. *Id.*

REASONS FOR DENYING THE WRIT

I.

McGINNIS WAS AFFORDED DUE PROCESS PROTECTIONS.

Alaska has long applied due process to protect the property rights of public employees, such as tenured teachers, in circumstances where they have been notified of termination from employment. This protection is explained by the Alaska Supreme Court in its decision in the case of *Kenai Peninsula Borough Board of Education v. Brown*, 691 P.2d 1034, 1036-7 (Alaska 1984), a case that was cited by the district court:

> A tenured teacher's due process rights prior to dismissal are set forth in AS 14.20.180. The Board must notify the teacher of the dismissal and provide "a statement of cause and a complete bill of particulars." The teacher may then request a public or private hearing and other rights, such as representation by counsel and cross-examination, are granted during the hearing. This hearing is to be held prior to an effective dismissal. A pre-termination hearing is consistent with due process and AS 14.20.180.

The Court of Appeals also cited to this case and relied upon it in affirming the judgment:

> Assuming that McGinnis had a contract despite her refusal to go to the personnel office and conclude a contract, Alaska law and the

> School District provided McGinnis with the pre-termination right to a hearing, because "termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1037 (Alaska 1984).
>
> McGinnis was notified of her right to this hearing concerning her termination but failed to respond or take advantage of the hearing opportunity. She recognized in her argument against prescriptive bar of the action that she was not officially terminated until 15 days after the termination notice.

App. B, p. 12a. Thus, it is the *opportunity* for a pre-termination hearing that is the touchstone of the due process protections. Under Alaska laws pertaining to tenured teachers, it is not until *after* the fifteen days, during which that opportunity exists and may be exercised, have expired that the termination became *effective*. *See City of North Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997) (which discusses both federal and state due process protections requiring an opportunity for a hearing before deprivation of the property interest in public employment). It is indeed peculiar that the only person who can't seem to grasp the meaning of this case is McGinnis, a former teacher and a lawyer.

II.

THE CORRECT STANDARD WAS APPLIED BY THE COURT OF APPEALS.

The Court of Appeals affirmed the judgment of the district court by adopting the reasons stated by the district court in its orders granting summary judgment. The Court of Appeals is required to grant de novo review of judgments rendered on summary judgment; that is, it is required to apply the same standards the district court is required to utilize under Rule 56 Fed. R. Civ. P. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); and *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). That standard is:

> Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

As this Court has ruled, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2522 (1986),

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party['s] case, and on which that party will bear the burden of proof at trial.

Moreover, a "scintilla" of evidence is not enough to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Nor do "mere allegation and speculation . . . create a factual dispute for purposes of summary judgment." *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing *Witherow v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995)).

The moving party has the burden of showing that there is no genuine dispute as to material facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. *Celotex*, 477 U.S. at 323-25. Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 248-49; *Adickes*, 398 U.S. at 160, n.22.

The non-moving party may not rest on mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. *Anderson*, 477 U.S. at 252. There is no genuine issue of material fact when the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. *Id.*, at 248; *Matsushita Elec. Indus. Co. Ltr. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

These are the standards applied by the Court of Appeals in its de novo review of the summary judgment decisions of the district court, which utilized the very same standards. Like the district court, the Court of Appeals reviewed the

record evidence and determined that there was no genuine dispute as to any material facts, since McGinnis had failed to offer sufficient admissible evidence of specific facts showing the existence of a genuine issue for trial. In this appeal, McGinnis again relied on the allegations in her unverified complaint and mere speculation. In addition, like the district court, the Court of Appeals found that reasonable fact-finders could not return a verdict for McGinnis and the District was entitled to judgment as a matter of law. *See* App. D, p. 12a.

CONCLUSION

McGinnis has failed to candidly disclose the undisputed facts in the record before the district court and the Court of Appeals that resulted in the affirmance of summary judgment for the District. McGinnis has also failed to recognize and accept the rule established by the due process cases that require an opportunity for a pre-termination hearing before the termination becomes effective. McGinnis has failed to show that she was denied that opportunity required by due process under the facts in the record in this case. McGinnis has disingenuously argued that the Court of Appeals applied the incorrect standard in its de novo review of the summary judgment rulings made by the district court when the record plainly shows that both the district court and the Court of Appeals applied the correct standard under Rule 56 Fed. R. Civ. P.

Therefore, the District respectfully submits that McGinnis has failed to demonstrate any questions of national importance raised by the unpublished Memorandum decision issued by the Court of Appeals in this case and requests this court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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